In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 48

M. A. GREENS COMPANY,
Petitioner,

v.

BENJAMIN GARGIEL, TRUSTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner,

v.

BENJAMIN GARGILL, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

M. A. Owens Company, the petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on July 31, 1958.

Citation to Opinion Below

The Opinion of the Court of Appeals is so far as your Petitioner has been able to ascertain, unreported but is included in the Record filed herein.

Jurisdiction

The judgment of the United States Court of Appeals was entered July 31, 1958. The jurisdiction of this Court is invoked, under Title 28 U.S.C. 1254(1).

Questions Presented

Whether or not the United States Court of Appeals is authorized by law and empowered to dismiss an appeal taken to it in a case in which the lack of jurisdiction of the District Court is obvious, from the Record, leaving the judgment of the District Court in full force and effect, or, whether the said Court of Appeals must *sua sponte* recognize the lack of jurisdiction in the District Court apparent from the Record and dismiss the action being maintained in violation of the jurisdictional limitatons of Statute upon the District Court of the United States.

Statute Involved

The Statutory provisions are Chapter XI of the Bankruptcy Act U.S.C. Title 28.

Statement of Facts

An alleged petition for an arrangement was filed by the Petitioner herein in the United States District Court for the District of Massachusetts in 1955. The said Petition contained no suggestion of insolvency or inability to pay its debts as they came due. The said lack of such allegation vitiated the entire petition and gave no jurisdiction to the District Court to act upon the Petition. The Petitioner filed a Petition for dismissal for lack of jurisdiction of the Court. The Court referred the Petition to a Referee. The

referee entered an order of adjudication as a bankrupt without holding any hearings upon the petition to determine the solvency or insolvency of the Petitioner. The Court upon review refused to vacate the adjudication and to dismiss the Petition for Arrangement. Appeal was claimed to the United States Court of Appeals for the First Circuit. The said Court received a motion from the Petitioner to Dismiss the entire proceedings *sua sponte* in the very apparent lack of jurisdiction of the District Court to act upon the Petition. The Court of Appeals entered an order and Mandate dismissing the Appeal for failure to perfect the appeal conformably to its rules.

On October , 1958 the said Court of Appeals stated its policy in the case of *MacNeil Bros. Company*, Petitioner. The said policy is contained in the copy of the opinion in said case filed herewith.

Reasons for Granting of the Writ

It appears from the Record in this case that there was no jurisdiction of the case in the first place in the United States District Court. The jurisdictional averment of insolvency was lacking. Therefore, according to the many decisions of this and other federal courts, neither the District Court nor the Court of Appeals had any jurisdiction of the case. The case should have been dismissed *sua sponte*. The Court of Appeals has stated its policy in the *MacNeil Bros. Company* case, in which by a quotation from *In re Josephson*, it implies that it will not seek to enforce justice but will rather act solely upon appeals. It, the Court of Appeals recognized the obligation of the District Court in the case mentioned, to inquire into the jurisdiction of itself *sua sponte*. But it indicates that it the Court of Appeals will do no such thing when confronted with a similar problem. Unless the decisions heretofore of this Court,

to the effect that no court can act in the absence of jurisdiction, are to be disregarded, then the Court of Appeals for the First Circuit is in error in failing to dismiss the case herein *sua sponte*. If the instance were an isolated case, possibly the Supreme Court could well deny certiorari. But in the face of the established policy of the U.S. Court of Appeals for the First Circuit as contained in the opinion herein filed in *MacNeil Bros. Company*, Petitioner *v. Bailey Aldrich*, Respondent, it seems that the said Court, not only erred but intends to follow the erroneous procedure continuously. The subjects of the United States within the judicial district of the United States Court of Appeals for the First Circuit have the right to have the laws of the United States enforced in the said District and the limitations of jurisdiction on its Courts recognized. As the Court of Appeals refuses to supervise the said administration of justice within the District, this Court it appears may well correct the policy of the said Court and issue the writ of certiorari as prayed for.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANGUS M. MACNEIL
Counsel for Petitioner

October 27, 1958

Appendix A

U.S.C. Title XI Chapter 11 Sec. 723 [Bankruptcy Act Sec. 323].

"A petition filed under this chapter shall state that the debtor is insolvent or unable to pay his debts as they mature and shall set forth the provisions of the arrangement proposed by him."

Appendix B

Excerpts from Opinion of U.S. Court of Appeals for the First Circuit *MacNeil Bros. Company* v. *Bailey Aldrich.* Case 5413 as yet unreported.

* * *

The proposed petition states that our "jurisdiction of this case arises from the general supervisory powers of the Courts of Appeals over the judges of the District Courts of the United States." We disclaim any such function. Our jurisdiction is purely statutory in accordance with the authority Congress has given us. Primarily we are an appellate court, but we are given a limited power to issue writs in aid of our appellate or potential appellate jurisdiction, in 28 U.S.C. § 1651 reading in part as follows: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." As we pointed out in *In re Josephson*, 218 F.2d 174, 177 (1954), "Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C. § 1651 grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit, and in particular to review by a writ of mandamus any unappealable order which we believe should be immediately reviewable in the interest of justice."

* * *

As in other situations of lack of jurisdiction, this is a matter which the court would be under a duty to examine on its own motion, without waiting for a motion to remand.

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